SUPREME COURT, U.S.
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No. 98-1522

In The

Supreme Court of the United States

October Term, 1998

TROOPER TOMMY HOBBS,

Petitioner,

v.

KATHY LEE GEORGE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

KEITH A. WARD, ESQ.
6555 S. Lewis, Ste. 200
Tulsa, OK 74136
(918) 492-7674

Counsel of Record for Respondent

KEITH A. WARD, ESQ.
RICHARD A. FORD, ESQ.
6555 S. Lewis, Ste. 200
Tulsa, OK 74136
(918) 492-7674

Attorneys for Respondent in the Lower Court

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COUNTER-STATEMENT OF QUESTION PRESENTED

1. Are there any sufficient reasons for this Court to grant Petitioner's Writ of Certiorari in this matter?

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COUNTER-STATEMENT OF THE CASE

1. Respondent, Kathy Lee George, brought this action pursuant to 42 U.S.C. § 1983 for various wrongful acts of the Petitioner, Tommy Hobbs, an Oklahoma Highway Patrol Officer.

2. During pre-trial litigation, Hobbs moved for summary judgment. His motion did not raise the defense of qualified immunity. All of George's claims were dismissed except her excessive force claim. The District Court ruled that there were genuine issues of material fact with respect to George's remaining claim.

3. This case proceeded to a jury trial on George's excessive force claim. At the conclusion of the Plaintiff's case, Hobbs moved for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. The District Court denied the motion. The motion asserted that there was no evidence to allow the jury to determine how a reasonable officer would have acted under the circumstances and no evidence that the Defendant did not act as a reasonable officer. After closing arguments, the Defendant renewed his Rule 50(a) motion for judgment as a matter of law which the District Court denied.

4. After deliberation, the jury announced that it was deadlocked and the District Court declared a mistrial.

5. Subsequently, Hobbs made a renewed motion for direct entry of judgment as a matter of law pursuant to Rule 50(b)(2)(B) of the Federal Rules of Civil Procedure. Hobbs argued exclusively that George failed to introduce any evidence showing what a reasonable officer would

have done in the same circumstances. This motion, as well as Hobbs' prior motions, did not raise the issue of qualified immunity.

6. The District Court denied Hobbs' Rule 50(b)(2)(B) motion. He appealed the District Court's denial of his Rule 50(b)(2)(B) motion to the Tenth Circuit. Hobbs argued that he is entitled to qualified immunity and that the issue of qualified immunity permits appellate jurisdiction as an exception to the final judgment rule.

7. Issues considered on appeal were whether the District Court had jurisdiction to hear petitioner Hobbs' appeal; whether the District Court reached a final decision; and whether the District Court issued a final order.

8. The Tenth Circuit Court of Appeals ruled that Hobbs' "appeal is jurisdictionally defective" holding that "the district court order denying Defendant's renewed motion under Rule 50(b) is not appealable until the district court disposes of the remaining claim." Moreover, the Tenth Circuit held that "even if Defendant's motion were construed as raising qualified immunity, the district court in denying the motion arguably believed the trial testimony contained sufficient fact-related information questioning the reasonableness of Defendant's use of force." *George v. Hobbs*, No. 98-7058, slip op. at 2 (10th Cir. Feb. 8, 1999).

SUMMARY OF ARGUMENT

Due to a mistrial in this case there has been no adjudication upon the merits and/or factual disputes.

Petitioner's appeal is not a final decision as required by 28 U.S.C. § 1291, and his renewed Rule 50(b) motion is not appealable. Furthermore, the issue of qualified immunity does not create an exception to this requirement in this case. Substantive issues of disputed material facts necessary to establish the defense of qualified immunity remain undecided and the trier of fact must determine whether Hobbs used excessive force in order for Petitioner to establish the defense of qualified immunity as a matter of law. Because the trier of fact has not made this determination, the Tenth Circuit Court of Appeals may not confer jurisdiction.

REASONS FOR DENYING THE PETITION

Petitioner's assertion of his defense of qualified immunity cannot be established as a matter of law, therefore the Circuit Courts are not in conflict and the lower courts did not commit error.

I. THE CIRCUITS ARE NOT IN CONFLICT

In support of his Petition, Trooper Hobbs contends that the Second Circuit Court of Appeals' ruling in the case of *O'Neill v. Town of Babylon*, 986 F.2d 646 (2nd Cir. 1993) and the Tenth Circuit Court of Appeals' ruling in this case are in conflict. On the contrary, in *O'Neill* the substantive issues of disputed material facts necessary to establish the defense of qualified immunity were decided at the district court level, thereby allowing the Second Circuit Court of Appeals to confer jurisdiction pursuant to this Court's ruling in *Mitchell v. Forsyth*, 472 U.S. 511,

105 S.Ct. 2806 (1985), despite the established requisite of a final order. However, in this case there still remains disputed issues of material fact, as evidenced by the trial court's ruling and the jury's inability to reach a final decision. Under these circumstances, the objective reasonableness of the Petitioner's conduct must be weighed by the trier of fact and the defense of qualified immunity cannot be decided as a matter of law.

In *O'Neill*, the Plaintiff filed suit against the Town of Babylon, New York and two of its bay constables. He asserted a claim for violation of his civil rights under 42 U.S.C. §§ 1982 and 1983. Specifically, he alleged that the town's officials harassed him in an effort to make him leave town. O'Neill also asserted claims of false arrest, malicious prosecution and excessive force which he alleged occurred during two separate arrests. In its opinion, the Second Circuit summarized the relevant procedural history of the case as follows:

> Tolkin and Hassan moved for summary judgment, asserting that they were entitled to qualified immunity with respect to the arrests of O'Neill. The court denied their motion on August 20, 1990. Tolkin and Hassan appealed, but we dismissed the appeal on September 6, 1990 because it was not perfected. The case proceeded to trial. At the close of O'Neill's case-in-chief, Tolkin and Hassan moved pursuant to Fed.R.Civ.P. 50(a) for judgment as a matter of law. The court granted this motion with respect to the false arrest and malicious prosecution claims arising from the June 20 arrest, but denied the motion with respect to the excessive force claims arising from the June 20 arrest and the claims against Tolkin and the Town arising from the June 24 arrest.

> **The jury returned a verdict in favor of Tolkin and Hassan on the excessive force claim arising from the June 20 arrest. The jury also returned a verdict in favor of Tolkin with respect to the false arrest claim arising from the June 24 arrest.** The jury, however, returned a verdict in favor of O'Neill on the malicious prosecution claim. It found that, although Tolkin had probable cause to arrest O'Neill on June 24, he nevertheless maliciously prosecuted O'Neill. The jury awarded O'Neill $5,000 in compensatory damages and $5,000 in punitive damages.
>
> Tolkin renewed his motions pursuant to Fed.R.Civ.P. 50(b) for judgment as a matter of law or, in the alternative, for a new trial pursuant to Fed.R.Civ.P. 59. On April 23, 1992, the court denied Tolkin's motion for judgment as a matter of law but granted his motion for a new trial on the ground that the jury's findings of probable cause and malicious prosecution were irreconcilable. On appeal, Tolkin challenges the court's denial of his rule 50 motion. He claims that he is entitled to qualified immunity as a matter of law, and therefore the court improperly denied these motions. We agree. (Emphasis added.)

Id. at 648-649. Clearly, the procedural scenario in *O'Neill* is distinguished from the present case. In this case, (1) the trial court determined that there were genuine issues of material fact concerning the objective reasonableness of Trooper Hobbs' actions which precluded granting summary judgment; (2) the trial court denied Petitioner's Rule 50(a) motion at the conclusion of the Plaintiff's case in chief; (3) the trial court denied Petitioner's renewed Rule 50(a) motion at the conclusion of closing arguments;

(4) the jury was unable to make a final determination as to any issue of material fact and the trial court declared a mistrial; and (5) the Petitioner's second renewed motion for judgment as a matter of law pursuant to Rule 50(b)(2)(B) was also denied by the trial court. Under these circumstances, *i.e.*, where no final judgment exists and where factual issues still remain as to a defendant's defense of qualified immunity, appellate courts lack jurisdiction. In fact, the Second Circuit in *O'Neill* acknowledged this jurisdictional prerequisite:

> Jurisdiction, however, is limited to circumstances where the qualified immunity defense may be established as a matter of law and **"is not available where the immunity issue turns on disputed issues of fact."** *White v. Frank*, 855 F.2d 956, 958 (2nd Cir. 1988). Indeed, **we lack jurisdiction when the determination of material factual issues is a "necessary predicate" to a resolution of whether qualified immunity is a bar to the litigation.** *Cartier, supra*, 955 F.2d at 844; see also *White, supra*, 855 F.2d at 962 (appeal from a summary judgment denying qualified immunity defense dismissed on ground that court lacked jurisdiction because "further exploration" was necessary to resolve the issue as a matter of law). (Emphasis added.)

Id. at 649.

Before the district court and/or any appellate court can make a determination as to whether an officer is entitled to qualified immunity from a claim of excessive force, the "objective reasonableness" standard as defined by this Court in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865 (1989) must first be applied to the officer's conduct.

Furthermore, in doing so, it is well settled that the reasonableness of force used by an officer is ordinarily a question of fact to be determined by the jury. *Liston v. County of Riverside*, 120 F.3d 965 (9th Cir. 1997), *citing Alexander v. County of Los Angeles*, 64 F.3d 1315, 1322 (9th Cir. 1995); *Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir. 1994); *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994); *Barlow v. Ground*, 943 F.2d 1132, 1135 (9th Cir. 1991).

In this case, questions of genuine material facts relating to Hobbs' conduct remain to be decided by the jurors in the new trial and the issue of qualified immunity cannot be decided as a matter of law. Therefore, the present case is clearly distinguished from *O'Neill*, the circuits are not in conflict, and the Tenth Circuit Court of Appeals properly dismissed the Petitioner's appeal as being jurisdictionally defective.

II. THE TENTH CIRCUIT DID NOT ERR

Petitioner contends that the Tenth Circuit Court of Appeals' refusal to accept jurisdiction of this appeal on the basis of qualified immunity is somehow in conflict with this Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806 (1985). However, as already stated, this case is an appeal regarding a question of qualified immunity in a case where issues of disputed fact clearly remain in dispute. Given these circumstances, the issue of qualified immunity, which hinges upon the factual determination of the reasonableness of Petitioner's conduct, cannot be decided purely as a matter of law. As such, this

case is distinguished from both *Mitchell* and *O'Neill, supra.*

The essence of the Tenth Circuit's dismissal of Petitioner's appeal was based upon the fact that the appeal was jurisdictionally defective because their was no final order disposing of all claims in the district court. Under these circumstances, there is no final order and a renewed Rule 50(b) motion is not appealable. *See Harold Stores, Inc. v. Dillard Dept. Stores, Inc.*, 82 F.3d 1533, 1542 (10th Cir.), *cert. denied*, 117 S.Ct. 297 (1996). As in *Harolds Store, Inc.*, Ms. George still has a viable claim before the District Court and, due to a mistrial, there has been no adjudication upon the merits and/or factual disputes in the case. Petitioner's appeal is not a final decision as required by 28 U.S.C. § 1291, nor does it fall within any exception to this requirement under *Mitchell* or *O'Neill, supra.* Therefore, the Tenth Circuit Court of Appeals did not commit any error in dismissing Hobbs' appeal and his Petition should be denied.

CONCLUSION

Because Petitioner's assertion of qualified immunity cannot be established as a matter of law, the Circuit Courts are not in conflict and the lower courts did not commit error. Therefore, Respondent respectfully requests that this Court deny Certiorari.

Respectfully submitted,

KEITH A. WARD, ESQ.
6555 S. Lewis, Ste. 200
Tulsa, OK 74136
(918) 492-7674

Counsel of Record
for Respondent

KEITH A. WARD, ESQ.
RICHARD A. FORD, ESQ.
6555 S. Lewis, Ste. 200
Tulsa, OK 74136
(918) 492-7674

Attorneys for Respondent
in the Lower Court

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